No. 12,430

IN THE

United States Court of Appeals

For the Ninth Circuit

WILLIAM PATRICK BRANDHOVE,
Appellant,

vs.

JACK B. TENNEY, THE SENATE FACT-FINDING COMMITTEE ON UN-AMERICAN ACTIVITIES (a California Legislative Committee), HUGH M. BURNS, NELSON S. DILWORTH, FRED H. KRAFT, LOUIS G. SUTTON, CLYDE A. WATSON and ELMER E. ROBINSON,
Appellees.

PETITION OF APPELLEES OTHER THAN ELMER E. ROBINSON FOR REHEARING

in which is contained a request that this Court grant a hearing in bank.

HAROLD C. FAULKNER,
WILBUR F. MATHEWSON,
MELVIN, FAULKNER, SHEEHAN & WISEMAN,
1101 Balfour Building, San Francisco 4, California,
FRED N. HOWSER,
Attorney General of the State of California,
C. J. SCOTT,
Assistant Attorney General of the State of California,
Library & Courts Building, Sacramento 14, California,
RALPH N. KLEPS,
J. D. STRAUSS,
A. C. MORRISON,
995 Market Street, San Francisco 3, California,
Attorneys for Appellees and Petitioners other than Elmer E. Robinson.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Constitutions

Other Authorities

No. 12,430

IN THE

United States Court of Appeals

For the Ninth Circuit

WILLIAM PATRICK BRANDHOVE,
Appellant,

vs.

JACK B. TENNEY, THE SENATE FACT-FINDING COMMITTEE ON UN-AMERICAN ACTIVITIES (a California Legislative Committee), HUGH M. BURNS, NELSON S. DILWORTH, FRED H. KRAFT, LOUIS G. SUTTON, CLYDE A. WATSON and ELMER E. ROBINSON,
Appellees.

PETITION OF APPELLEES OTHER THAN ELMER E. ROBINSON FOR REHEARING
in which is contained a request that this Court grant a hearing in bank.

To the Honorable William Healy, Judge of the United States Court of Appeals for the Ninth Circuit, and William C. Mathes and Samuel L. Driver, United States District Judges, and as to the request for a hearing in bank To All of the Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

We solicit the Court's special attention to this petition for the reason that this is a case of first impression, one of vital interest to the State of California because of its great impact upon its legislative process; that the Court's decision is based upon a theory of law and fact never considered by the Court below, never advanced by the appellant and never briefed by the parties.

A rehearing and a hearing in bank is sought in a sincere belief that the opinion filed herein on the 30th day of June, 1950, is in error in law.

GROUNDS FOR REHEARING.

(The order of presentation has no relation to relative importance.)

I. The Right Involved Was Not Freedom of Speech; It Was the Right to Petition the California Legislature.

II. The Right to Petition the California Legislature Is Not One Secured to Appellant by the Constitution or Laws of the United States.

III. The Court Has Rewritten the Complaint to Charge Reprisal.

IV. The Judiciary Has Not the Power to Inquire Into the Motives of the Legislative Branch of the Government.

V. The State Legislators of California Are Exempt From Civil Liability.

VI. The General Allegation of Malice and Intent Is Not Enough.

VII. The Complaint Is Neither a Short Nor a Plain Statement of the Claim of Appellant.

This is a case presenting fundamental questions of Constitutional law pertaining to the relationship between the Federal and State Governments and to the respective powers of the Courts and the Legislature. This is a case of first impression in the following respects:

This is the first case in which it has been held that the right to petition a state legislature is a right secured to the citizen by the Constitution of the United States.

This is the first case in which it has been held that the lawfulness or unlawfulness of legislative acts depends solely upon the motive of the members of the legislature.

This is the first case in which a citizen of a state who has exercised his right as a citizen of the state to petition a state legislature with respect

to a purely state matter has asked for and, by the ruling of this Court has obtained, the intervention of a United States Court to compel state legislators to justify their conduct and answer in damages for conduct in the performance of their lawful functions.

ARGUMENT.

I.

THE RIGHT INVOLVED WAS NOT FREEDOM OF SPEECH; IT WAS THE RIGHT TO PETITION THE CALIFORNIA LEGISLATURE.

The right of appellant, if any is here involved, was not the right of freedom of speech, it was rather the right to petition the legislature for redress of a grievance.

The appellant circulated the petition among members of the State Legislature only; he did not circulate it among members of the general public nor did he attempt to do so. He did not address nor attempt to address any group or public or private body.

The rights are not one and the same. They are expressed in different *clauses* of Amendment I to the Constitution of the United States and different *sections* of the Constitution of the State of California.

Amendment I of the Constitution of the United States provides:

> "Amendment I—Freedom of Religion. Congress shall make no law respecting an establishment of

religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Article I, Sec. 9 of the Constitution of the State of California provides:

"Liberty of Speech and of the Press. Sec. 9. Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. * * *"

Article I, Sec. 10 of the Constitution of the State of California provides:

"Right to Assemble and to Petition. Sec. 10. The people shall have the right to freely assemble together to consult for the common good, to instruct their representatives, and to petition the Legislature for redress of grievances."

The right to petition is distinct and separate from the right of assembly.

We state as positively as it is possible to declare that there isn't a scintilla of fact pleaded in this case which relates to "Freedom of Speech", "Equal Protection of the Law", "Due Process of the Law", "Infringement of Equal Privilege and Immunities as a Citizen of the United States". Each is merely a phrase written in the complaint. There remains but one thing, and that is the right to petition the legislature for

redress of grievances. The Court held in this opinion that appellant exercised that right. This determination should have ended this case, because the claim for relief of appellant (as found by the Court) is based upon the interference with the exercise of a right which was actually exercised.

II.

RIGHT TO PETITION THE CALIFORNIA LEGISLATURE IS NOT ONE SECURED TO APPELLANT BY THE CONSTITUTION OR LAWS OF THE UNITED STATES.

This point was urged to this Court in our brief. The present decision not only does not decide the point; it does not even refer to it.

Although the right to petition is a fundamental one it is a right limited to the "citizen" not the individual. It is a fundamental right not conferred by either the Constitution of the United States or of the State of California but rather secured to the citizens of each sovereign by the Constitutions thereof.

United States v. Cruikshank, 92 U.S. 542, 552.

Being an attribute of "citizenship" it necessarily follows that the right of a citizen of the United States to petition his *government* differs from the right of a citizen of the State of California to petition *the legislature.*

Hence the right of a citizen of California to petition the State Legislature is not one secured to him

by the Constitution or laws of the United States and is subject only to State jurisdiction.

United States v. Cruikshank, supra, p. 551.

It is only the right to petition the United States Government which being an attribute of national citizenship is secured and protected by the Constitution of the United States.

United States v. Cruikshank, supra.

See also

Crandall v. Nevada, 73 U.S. 35, 44.

There is nothing to the contrary to be found in *Hague v. Committee for Industrial Organization,* 307 U.S. 496, 59 S. Ct. 954, for there the assemblies sought to be eliminated were for the purpose of discussing National rather than State legislation.

> "The question now presented is whether freedom to disseminate information concerning the provisions of the National Labor Relations Act, to assemble peaceably for discussion of the Act, and of the opportunities and advantages offered by it, is a privilege or immunity of a citizen of the United States secured against State abridgment by Section 1 of the Fourteenth Amendment; and whether R.S. Sec. 1979 and Section 24(14) of the Judicial Code afford redress in a federal court for such abridgment. This is the narrow question presented by the record, and we confine our decision to it, without consideration of broader issues which the parties urge."

We respectfully submit that the present decision is in conflict with the reasoning, holding and cases cited

by this Court in its opinion in *Hardyman et al. v. Collins et al.,* decided May 29, 1950.

The Fourteenth Amendment is the Constitutional authority for the Civil Rights Acts; the extent of their application is limited by the scope of the Amendment.

United States v. Cruikshank, supra.

Not only is the right to petition the State Legislature not one of the rights set out in the Bill of Rights, but it is also true that the due process clause of the Fourteenth Amendment did not require the State to give to its citizens all the rights secured to the citizen of the United States by the Bill of Rights.

These rights are many, here are a few:

Right to trial by jury in a State Court.

Tompsett v. Ohio, 146 Fed. (2d) 95.

Freedom from unreasonable searches and seizures.

United States v. Crosby, 1 Hughes 448, Fed. case No. 14,893.

Right to indictment by Grand Jury.

Maxwell v. Dow, 176 U.S. 581.

Prohibition against self-incrimination.

Adamson v. California, 332 U.S. 46, 67 S. Ct. 1672.

Right to be charged by indictment in felony cases.

Hurtado v. California, 110 U.S. 516.

The political relation between the State and its citizens is free from federal interference. Such freedom is essential in preserving the balance between the na-

tional and state power. As stated in the *Adamson* case, supra, at pages 1675 and 1676:

> "The reasoning that leads to those conclusions starts with the unquestioned premise that the Bill of Rights, when adopted, was for the protection of the individual against the federal government and its provisions were inapplicable to similar actions done by the states. Barron v. Baltimore, 7 Pet. 243, 8 L. Ed. 672; Feldman v. United States, 322 U.S. 487, 490, 64 S. Ct. 1082, 1283, 88 L. Ed. 1408, 154 A.L.R. 982. With the adoption of the Fourteenth Amendment, it was suggested that the dual citizenship recognized by its first sentence, secured for citizens federal protection for their elemental privileges and immunities of state citizenship. The Slaughter-House cases decided, contrary to the suggestion, that these rights, as privileges and immunities of state citizenship, remained under the sole protection of the state governments. This Court, without the expression of a contrary view upon that phase of the issues before the Court, has approved this determination. Maxwell v. Bugbee, 250 U.S. 525, 537, 40 S. Ct. 2, 5, 63 L. Ed. 1124; Hamilton v. Regents, 293 U.S. 245, 261, 55 S. Ct. 197, 203, 79 L. Ed. 343. This power to free defendants in state trials from self-incrimination was specifically determined to be beyond the scope of the privileges and immunities clause of the Fourteenth Amendment in Twining v. New Jersey, 211 U.S. 78, 91-98, 29 S. Ct. 14, 16-19, 53 L. Ed. 97. 'The privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the state.' The Twining case likewise disposed of the contention that freedom from testimonial

compulsion, being specifically granted by the Bill of Rights, is a federal privilege or immunity that is protected by the Fourteenth Amendment against state invasion. This Court held that the inclusion in the Bill of Rights of this protection against the power of the national government did not make the privilege a federal privilege or immunity secured to citizens by the Constitution against state action. Twining v. New Jersey, supra, 211 U.S. at pages 98, 99, 29 S.Ct. at page 19, 53 L. Ed. 97; Palko v. Connecticut, supra, 302 U.S. at page 328, 58 S. Ct. at page 153, 82 L. Ed. 288. After declaring that state and national citizenship co-exist in the same person, the Fourteenth Amendment forbids a state from abridging the privileges and immunities of citizens of the United States. As a matter of words, this leaves a state free to abridge, within the limits of the due process clause, the privileges and immunities flowing from state citizenship. This reading of the Federal Constitution has heretofore found favor with the majority of this Court as a natural and logical interpretation. It accords with the constitutional doctrine of federalism by leaving to the states the responsibility of dealing with the privileges and immunities of their citizens except those inherent in national citizenship. It is the construction placed upon the amendment by justices whose own experience had given them contemporaneous knowledge of the purposes that led to the adoption of the Fourteenth Amendment. This construction has become embedded in our federal system as a functioning element in preserving the balance between national and state power."

Except as limited by the Fifteenth Amendment the State has complete power over suffrage. As stated in *Guinn v. United States,* 238 U.S. 347, 35 S. Ct. 926, 930.

> "Beyond doubt the Amendment does not take away from the state governments in a general sense the power over suffrage which has belonged to those governments from the beginning, and without the possession of which power the whole fabric upon which the division of state and national authority under the Constitution and the organization of both governments rest would be without support, and both the authority of the nation and the state would fall to the ground. In fact, the very command of the Amendment recognizes the possession of the general power by the state, since the Amendment seeks to regulate its exercise as to the particular subject with which it deals."

Cf. *Breedlove v. Suttles,* 302 U.S. 277, 58 S. Ct. 205.

The cases dealing with national as contrasted with State elections should not be confused. Those involve an entirely different principle namely, that the federal government has exclusive control, should it choose to exercise it, over the relation between the federal government and its citizens which it may protect from state interference.

Likewise the right to become a candidate for a state office is a right or privilege of state not national citizenship and is not secured a person by the Constitution of the United States.

Snowden v. Hughes, 321 U.S. 1, 64 S. Ct. 397.

III.

THE COURT HAS REWRITTEN THE COMPLAINT TO CHARGE REPRISAL.

The Court's opinion is based upon the concept that the complaint states a claim for relief for damages for reprisal, punishment and oppression the consequence of appellant's having exercised his right of freedom of speech. This appears from the affirmative finding in the opinion which conforms to the record that:

> "'True, the Committee did not prevent him from exercising his right; he did succeed in making his message public.'' (Page 5, paragraph 3.)

and the statement:

> "Appellant is entitled not only to exercise the right but to be protected against official reprisal for having exercised it. And considering his pleading as a whole it is rationally possible to believe that the Committee purposely undertook, under an appearance of regularity, to intimidate, punish and oppress him for having done what he did.''

The complaint itself is not only barren of any allegations of reprisal or of punishment or oppression (even the words "punish and oppress'' appear in the opinion alone and not in the pleading) but it affirmatively appears that it is the gravamen of the appellant's complaint that it was the purpose of the Committee to deprive him of the right of petitioning the legislature and that he was so deprived.

The purpose of the Committee hearing is set out in paragraph 7 of the complaint (Transcript p. 6) as follows:

> "Said hearing of the Tenney Committee on January 29, 1949, was held, as was known to all defendants, for the *purpose and object of suppressing the criticism of plaintiff* in his circulated petition and the charges therein directed against the Tenney Committee and the individual defendants, to the end that said Committee should obtain the appropriation of funds requested from the California legislature." (Italics added)

The motive and intent are alleged in paragraph 13 of the complaint (Transcript p. 10, Court's opinion p. 4, paragraph 2) as follows:

> "The acts of defendants above set forth were done or participated in by said defendants with malice and intent to intimidate and silence plaintiff and deter and prevent him from effectively exercising his constitutional rights of free speech *and to petition the Legislature for redress of grievances,* and also to deprive him of the equal protection of the law, due process of law, and of the enjoyment of equal privileges and immunities as a citizen of the United States under the law, and so did intimidate, silence, deter and prevent and deprive plaintiff." (Italics added)

The purpose and intent appear to have been to deter and prevent appellant from effectively exercising his right to petition the legislature of the State of California. One cannot deter or prevent an accomplished act, the pleader referred to future contemplated acts.

Of the words "intimidate, punish, and oppress" appearing in the Court's opinion as "rationally possible to believe" with respect to the Committee's purpose only the word "intimidate" appears in the complaint and there it was used to allege a purpose to "silence" plaintiff.

That such was the pleader's theory is likewise demonstrated not only by his failure to cite the case relied upon by the Court for support of this doctrine, namely the case of *Bomar v. Keyes,* but also by his initial and continued reliance upon the theory that appellant was denied constitutional rights because of the unconstitutionality of the Committee itself.

It is very apparent that the complaint was inspired by the hope that the Supreme Court of the United States might hold the Congressionally created Committee on Un-American Activities unconstitutional. (In this connection note Paragraph 11 of Brandhove's complaint and Brandhove's application to the Supreme Court for release on a Writ of Habeas Corpus.)

Shortly before or about the time of the filing of the complaint the Circuit Courts of the United States upheld the constitutionality of the Congressional Committee on Un-American Activities and the Supreme Court refused to disturb said holdings.

Thus the decision upholding the complaint on the theory that reprisal may constitute an interference with a constitutional right was

(1) Not urged to nor passed upon by the lower Court, whose decision is being reviewed;

(2) Not briefed by either party to this Court.

This is a far different case than *Bomar v. Keyes,* supra. There the reprisal was taking away a job.

What does the reprisal consist of here? The lawful convening of a committee; the lawful subpoenaing of a witness. After that everything that occurred resulted from the conduct of Brandhove at the committee hearing. Brandhove's contempt was an intervening act which broke a causal connection between circulating the petition and what transpired in the committee meeting after his flagrant contempt.

IV.

THE JUDICIARY HAS NOT THE POWER TO INQUIRE INTO THE MOTIVES OF THE LEGISLATIVE BRANCH OF THE GOVERNMENT.

The Court in its opinion conceded that the acts of the Committee were lawful and that they were conducted in a lawful manner. It is admitted that the appellant was not deprived of his right to petition the State Legislature. Therefore to spell out a claim for relief on behalf of the appellant the Court necessarily and in apparent reliance upon the *Bomar* case held that a claim for relief would be stated if the lawful acts of the Committee were the result of malice and to effectuate an intent to punish and oppress appellant for having exercised his right. Thus, the existence or non-existence of a claim for relief on the part of ap-

pellant depends upon the motive and intent of the Committee. It is therefore respectfully submitted that there can be no claim for relief which depends upon the existence or non-existence of such a motive in a legislative committee because it is not within the power of this Court to inquire into that motive.

On the basis of the authorities cited by appellees in their brief part I, subdivision 3 thereof, pages 18 and 19 the creation of the committee was within the constitutional powers of the legislature.

It has been held uniformly in the many cases to be hereinafter cited that the Federal Courts have no power to inquire into the motives of committees created by Congress once it has been determined that the committees were created within the constitutional powers of the Congress and the scope of the inquiry of the Committee did not exceed the limits set by a possible legislative purpose.

If it be suggested that the cases to be cited are dissimilar because they do not involve the Civil Rights Acts it should be noted at the outset that the Court in this case and the Courts in the cases to be cited were all asked to find the action of the committees unconstitutional because their actions infringed upon the right of individuals secured by the First Amendment of the Constitution.

In the cases to be cited the prohibitions of the First Amendment were applied directly, that is, to the direct action of Congress. In this case the prohibitions of the First Amendment are still sought to be

applied not directly but by virtue of the provisions first of the Fourteenth Amendment and secondly, of the Civil Rights Acts. Thus, the power of this Court to inquire into the motives of the legislative Committee is no greater than the power of this or the other Federal Courts to inquire into the motives of the committees created by Congress.

In *Dennis v. United States,* 171 F. (2d) 986, 988, the Court stated:

> "Once the rule has been established that the creation of the Committee was within the constitutional powers of the Congress (as has been well established by the three cases noted supra), it is neither the business nor the prerogative of this court or any other court to pass upon either the wisdom of Congress in setting up the Committee, the private or public character of members of the Committee or the propriety of the procedure of the Committee unless it transgress the authority committed to it by the Congress under the Constitution."

In the case of *Eisler v. United States,* 170 F. (2d) 273, 278, the Court stated:

> "During the course of the trial defense counsel sought to introduce evidence to show that the Committee's real purpose in summoning appellant was 'to harass and punish him for his political beliefs * * * and that the Committee acted for ulterior motives not within the scope of its or Congress' powers.' The lower court properly refused to admit such evidence, on the ground that the court had no authority to scrutinize the motives of Congress or one of its committees."

Although the Court did not cite any authority for the propositions quoted above the Court will observe that both the *Dennis* and *Eisler* cases were decided by the United States Court of Appeals, District of Columbia and in both cases the Court consisted of Associate Justices Clark, Prettyman and Proctor. Previous to the decision of the Court in the *Dennis* and *Eisler* cases the same Court with Associate Justices Clark, Prettyman and Edgerton had decided the case of *Barsky v. United States,* 167 F. (2d) 241, in which case the Court stated:

> "Appellants press upon us representations as to the conduct of the Congressional Committee, critical of its behavior in various respects. Eminent persons have stated similar views. But such matters are not for the courts. We so held in *Townsend v. United States,* citing *Hearst v. Black.* The remedy for unseemly conduct, if any, by Committees of Congress is for Congress, or for the people; it is political and not judicial. 'It must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.' The courts have no authority to speak or act upon the conduct by the legislative branch of its own business, so long as the bounds of power and pertinency are not exceeded, and the mere possibility that the power of inquiry may be abused 'affords no ground for denying the power.' The question presented by these contentions must be viewed in the light of the established rule of absolute immunity of governmental officials, Congressional and administrative, from liability for damage done by their acts or speech, even though know-

ingly false or wrong. The basis of so drastic and rigid a rule is the overbalancing of the individual hurt by the public necessity for untrammeled freedom of legislative and administrative activity, within the respective powers of the legislature and the executive."

In the *Townsend* case cited by the Court (*Townsend v. United States,* 95 F. (2d) 352 at page 361), the Court stated:

"Because a witness could not understand the purpose of cross-examination, he would not be justified in leaving a courtroom. The orderly processes of judicial determination do not permit the exercise of such discretion by a witness. The orderly processes of legislative inquiry require that the committee shall determine such questions for itself. *Within the realm of legislative discretion, the exercise of good taste and good judgment in the examination of witnesses must be entrusted to those who have been vested with authority to conduct such investigations.* Hearst v. Black, 66 App. D.C. 313, 87 F.2d 68. A witness may exercise his privilege of refusing to answer questions and submit to a court the correctness of his judgment in so doing, but in the event he is mistaken as to the law it is no defense, for he is bound rightly to construe the statute. Sinclair v. United States, supra, 279 U.S. 263, at page 299, 49 S.Ct. 268, 273, 73 L.Ed. 692. Beyond this, he must conform to the procedure of the committee and respond to its questions. McGrain v. Daugherty, supra, 273 U.S. 135, at pages 175, 176, 47 S.Ct. 319, 329, 71 L.Ed. 580, 50 A.L.R. 1. He cannot be heard to plead justification and, hence, lack of

willfulness in defiantly leaving a hearing because he does not like the questions propounded to him —remedy by objection and refusal to answer both being open to him." (Italics added.)

In the case of *Hearst v. Black,* also cited by the Court in the *Barsky* case (*Hearst v. Black*, 87 F. (2d) 68 at pages 71 and 72), the Court stated:

"The prayer of the bill is that the committee be restrained from keeping the messages or making any use of them or disclosing their contents. In other words, that if we find that the method adopted to obtain the telegrams was an invasion of appellant's legal rights, we should say to the committee and to the Senate that the contents could not be disclosed or used in the exercise by the Senate of its legitimate functions. We know of no case in which it has been held that a court of equity has authority to do any of these things. *On the contrary, the universal rule, so far as we know it, is that the legislative discretion in discharge of its constitutional functions, whether rightfully or wrongfully exercised, is not a subject for judicial interference.*

The Constitution has lodged the legislative power exclusively in the Congress. If a court could say to the Congress that it could use or could not use information in its possession, the independence of the Legislature would be destroyed and the constitutional separation of the powers of government invaded. *Nothing is better settled than that each of the three great departments of government shall be independent and not subject to be controlled directly or indirectly by either of the*

others. 'This separation and the consequent exclusive character of the powers conferred upon each of the three departments is basic and vital—not merely a matter of governmental mechanism.' Springer v. Philippine Islands, 277 U.S. 189, 201, 48 S.Ct. 480, 482, 72 L.Ed. 845." (Italics added.)

Among the cases relied upon by the Court in the *Hearst* case was the case of *Alpers v. San Francisco* (Circuit Court, Northern District, California, 1887), 32 Fed. 503, in which in an opinion by Circuit Justice Field it was stated:

"The difficulty presented in the case before us is that the application to enjoin the passage of any resolution, order, or ordinance, which may tend to impair the obligation of the contract, is an application to enjoin a legislative body from the exercise of legislative power, and to enjoin the exercise of such power is not within the jurisdiction of a court of equity. This no one will question as applied to the power of the legislature of the state. *The suggestion of any such jurisdiction of the court over that body would not be entertained for a moment. The same exemption from judicial interference applies to all legislative bodies, so far as their legislative discretion extends.* Municipal corporations are instrumentalities of the state for the more convenient administration of local affairs, and for that purpose are invested with certain legislative power. In the exercise of that power, upon the subjects submitted to their jurisdiction, they are as much beyond judicial interference as the legislature of the state. The courts cannot in the one

case forbid the passage of a law nor in the other the passage of a resolution, order, or ordinance. If by either body, the legislature or the board of supervisors, an unconstitutional act be passed, its enforcement may be arrested. The parties seeking to execute the invalid act can be reached by the courts, while the legislative body of the state, or of the municipality, in the exercise of its legislative discretion, is beyond their jurisdiction. The fact that in either case the legislative action threatened may be in disregard of constitutional restraints, and impair the obligation of the contract, as alleged in this case, does not affect the question. It is legislative discretion which is exercised, and that discretion, whether rightfully or wrongfully exercised, is not subject to interference by the judiciary." (Italics added.)

Another case relied upon by the Court in the *Hearst* case was the case of *New Orleans Water Works Co. v. City of New Orleans,* 164 U.S. 483, 17 S. Ct. 161, in which it was stated in an opinion by Justice Harlan at page 165:

"If it be said that a final decree against the city, enjoining it from making such grants in the future, will control the future action of the city council of New Orleans, and will, therefore, tend to protect the plaintiff in its rights, our answer is that a court of equity cannot properly interfere with, or in advance restrain, the discretion of a municipal body while it is in the exercise of powers that are legislative in their character. *It ought not to attempt to do indirectly what it could not do directly.* In view of the adjudged

cases, it cannot be doubted that the legislature may delegate to municipal assemblies the power of enacting ordinances that relate to local matters, and that such ordinances, if legally enacted, have the force of laws passed by the legislature of the state, and are to be respected by all. But the courts will pass the line that separates judicial from legislative authority if by any order, or in any mode, they assume to control the discretion with which municipal assemblies are invested when deliberating upon the adoption or rejection of ordinances proposed for their adoption." (Italics added.)

The Court in the *Barsky* case also relied upon the historical case of *McGrain v. Daugherty,* 273 U.S. 135, 47 S. Ct. 319.

At page 329 the Court clearly held that even the abusive and oppressive use of the power of inquiry by a Congressional Committee affords no ground for denying the power and that the relief to be afforded an individual who is subject to such oppressive and abusive use of the power consists of the right to refuse to answer such questions or to the right of Writ of Habeas Corpus if he is incarcerated for refusing to do so. The Court stated in this connection:

"The contention is earnestly made on behalf of the witness that this power of inquiry, if sustained, may be abusively and oppressively exerted. If this be so, it affords no ground for denying the power. The same contention might be directed against the power to legislate, and of course would be unavailing. We must assume,

> for present purposes, that neither house will be disposed to exert the power beyond its proper bounds, or without due regard to the rights of witnesses. But if, contrary to this assumption, controlling limitations or restrictions are disregarded, the decisions in Kilbourn v. Thompson and Marshall v. Gordon point to admissible measures of relief. And it is a necessary deduction from the decisions in Kilbourn v. Thompson and In re Chapman that a witness rightfully may refuse to answer where the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry."

In the *McGrain v. Daugherty* case the Court cited as one of the authorities the case of *Marshall v. Gordon,* 243 U.S. 521, 37 S.Ct. 448, where the Court in determining the extent of the legislative power to punish for contempt in a case which was similar to the one at bar inasmuch as it arose out of an irritating and ill-tempered statement addressed to Congress in a letter, the Court stated with respect to the power of Congress to punish for a contempt for an obstruction of the exercise of the legislative power:

> "And of course in such case, as in every other, unless there be manifest an absolute disregard of discretion and a mere exertion of arbitrary power coming within the reach of constitutional limitations, the exercise of the authority is not subject to judicial interference."

It thus seems to be clearly established that the Federal Courts do not have the power to inquire into

the motives of the legislative departments of the Federal or of the State Governments; that the power of the Court in this case can be no greater than the power of the Courts to inquire into the motives of the Congressional Committees for the only justification for such inquiry would be the application of the provisions of the First Amendment to the Constitution of the United States in the one case directly and in the other case by virtue of the provisions of the Fourteenth Amendment and the Civil Rights Acts and the Fourteenth Amendment and the Civil Rights Acts can do no more than apply the provisions of the First Amendment to the acts of the State and it is apparent from the foregoing authorities that the fundamental requirement of a separation of powers has precluded the inquiry by the judiciary into the motives of the legislative branch of the government.

It is apparent from the decision that the Court below relied heavily upon the decision in the *Eisler* and *Dennis* cases. The *Eisler* case and the *Barsky* case state flatly that the judicial power may not be used to scrutinize the motives of the committee. This Court has held that this committee acted in a lawful manner, but that its motives when inquired into may give rise to a claim for relief under the Civil Rights Acts. Thus the effect of the holding here is in direct conflict with the holding in the cases cited. The purpose of the investigation of Un-American Activities of necessity involves freedom of the press, freedom of speech, freedom to assemble, and when the speech

and the writing and the assemblage of people engaged in un-American activities are hereafter to be the subject matter of an investigation by a lawfully constituted committee, exercising constitutional powers to do such investigating, those investigating must face a claim for damages under the Civil Rights Acts upon the bare declaration that the act committed is in reprisal for having exercised free speech, freedom of the press, and the freedom to assemble because the witness claimed malice. That is the holding of this Court, for this Court holds that the motives which prompt a legislative body, acting through a committee (but why not the Legislature itself?), may be scrutinized by the judicial branch of the government. The republican form of government does not contemplate this power in the judiciary.

We urged this point strongly to the lower Court and to this Court. The present decision passes this point, that goes to a "basic and vital" power of a Legislature to act independently of the judiciary on matters within the scope of the Legislature's power, without discussion or even comment.

We respectfully urge that the Legislature of the State of California is entitled to have this point determined. It is vital to its own existence, and thus we request a hearing in bank.

V.

THE STATE LEGISLATORS OF CALIFORNIA ARE EXEMPT FROM CIVIL LIABILITY.

Section 4 of Article IV of the Constitution provides, among other things, as follows:

"The United States shall guarantee to every state in this Union a republican form of government * * *." As part of a republican form of government it is unquestioned "that all of the powers entrusted to government, whether state or national, are divided into three grand departments, the executive, the legislative and the judicial." The privileges secured to members of the legislative body, both state and federal, by which they are exempt from civil responsibility for their acts, resulting from the nature and in the execution of their office, are definite and positive. The leading case on this subject is *Kilbourn v. Thompson,* 103 U.S. 168. The discussion on this interesting subject starts on page 201. In reading this case, we suggest that the language of Mr. Chief Justice Parsons, quoted with approval, be considered. Again with approval, the Supreme Court quotes the following:

> "Mr. Justice Story (sect. 866 of his Commentaries on the Constitution) says: 'The next great and vital privilege is the freedom of speech and debate, without which all other privileges would be comparatively unimportant or ineffectual. This privilege also is derived from the practice of the British Parliament, and was in full exercise in our colonial legislation, and now belongs to the

legislation of every State in the Union as matter of constitutional right.' ''

See, also:

Collins v. Riley, 24 Cal. (2d) 912, 915;
Ex parte McCarthy, 29 Cal. 395;
Hearst v. Black, supra;
United States v. Bryan, 72 F. Supp. 58;
Cochran v. Couzens, 42 F. (2d) 783;
Spalding v. Vilas, 161 U.S. 483.

We urge to the Court:

1. That a member of the State Legislature of California is immune from civil liability for acts done during the performance of his legislative duty.

2. That when this Court determines that the meeting was within the power of the Committee to call and that the subpoenaing of Brandhove was within its power, state legislators are immune from civil liability for their acts during the course of the meetings lawfully held.

3. That the right of Brandhove stems from a statute; the immunity of the Legislature stems from the Constitution. Under these circumstances the constitutional rights of the legislators are paramount.

4. That a construction of the Civil Rights Act as paramount to the right of members of the State Legislature derived from the Constitution of the United States would be unconstitutional and void.

VI.

THE GENERAL ALLEGATION OF MALICE AND INTENT IS NOT ENOUGH.

As a matter of pleading it is submitted the allegations with respect to the motive or intent of the Committee are general allegations and are not supported by the specific facts pleaded.

The Court apparently believes that the rule to be applied is that the specific facts alleged need only tend to support the general allegation, for this Court stated at page 4 of its opinion:

> "The conclusions are of ultimate fact and some of them appear not to be without a measure of support in the circumstances disclosed."

This holding is in direct conflict with the rule in cases of this kind that the general allegation of malice and intent must be substantiated by specific facts pleaded and that the Court will examine the complaint with meticulous care to determine that this is done.

> *Gibson v. Reynolds,* 172 F. (2d) 95 (cited with approval in *Dodez v. Wegandt,* 173 Fed. 967).

The *Gibson* case, supra, was an action brought by a Jehovah witness against the members of a local draft board, the Selective Service Appeal Board, the State Director of Selective Service for Arkansas and his assistant, the chief of the legal division for the Arkansas State Directors seeking damages for alleged improper classification of appellant under the Selective Training and Service Act of 1940. The com-

plaint, one for damages under the Civil Rights Act as well as for malicious prosecution, was dismissed on motion on the ground that the appellees in classifying appellant were acting within the scope of their authority and duty imposed and conferred upon them by the Selective Service Act and were not subject to a civil action for damages on account of such acts.

It was in connection with such allegations relating to the malice of the defendants that the Court made the following statement which seems particularly applicable to this case:

> "We do not scrutinize with meticulous nicety the allegations of a complaint when appraising its sufficiency on motion to dismiss. The contrary is the established rule. Dennis v. Village of Tonka Bay, 8 Cir., 151 F.2d 411, and cases there cited. But when a litigant contends that the factual allegations of his complaint demonstrate that a group of public officers, presumed to have done their duty, were guilty of such wanton, spiteful, malicious prejudice that their acts, ostensibly done in the performance of their statutory duties, were therefore not acts done 'in relation to or connected with' those duties but were in fact vengeful acts committed for the purpose of personally injuring the litigant, *the reviewing court must examine those factual allegations with meticulous care to determine whether such a case is stated.*" (Italics added.)

The Court here not only did not apply this rule but on the contrary indicated that it was satisfied with the general allegation of malice and intent. It did not examine the other allegations with meticulous

care to see that they supported the general allegation and the language of the opinion indicates that it did not.

The gravamen of the appellant's claim for relief appears to be in paragraph 13. The first part charges: The acts of defendants above set forth were done or participated in by said defendants with: (1) malice; (2) intent to prevent him from exercising his constitutional rights of free speech and to petition the Legislature for redress of grievances; (3) and also to deprive him of, and here is alleged phrases from the Constitution which has no relation whatsoever to any facts pleaded in the complaint.

In respect to number 2 above, the Court has held in its opinion and the pleading shows on its face that he was not silenced and that he did exercise and was not actually interfered with in the exercise of this right. It appears implicit in this decision that if the motive of the committee was malicious the appellant has a claim for relief and that there was malice as a matter of law.

There can be no malice where a lawful act is involved and the means employed are lawful.

> "Malice in law exists where a wrongful act is intentionally done without just cause or excuse, but since malice in law is predicated on the doing of an unlawful act or the doing of a lawful act in an unlawful manner, it cannot exist where the thing done is lawful and the means employed are lawful."
>
> 54 *C.J.S.* 915.

This Court recognizes that the subpoena issued was lawful; the hearing held was lawful, and at the time of the hearing there existed within the committee power to hold the meeting. This is true under the law of California and is recognized in the present decision of this Court. Brandhove was in open defiance and contempt of the committee at the very commencement of the hearing. It must be borne in mind he was permitted by the committee to present and make part of the record the inflammatory petition which he had already circulated in the Capitol of Sacramento until the Legislature adjourned. If we read the opinion of the Court correctly, it appears they frown on the fact that two of the defendants in this case sent telegrams to district attorneys in San Francisco and Alameda County, suggesting that they act against Brandhove, or impanel a Grand Jury for that purpose. Can there be any question that this is lawful? It would seem to be completely in accordance with their duties as State Legislators.

After the hearing was completed as to Brandhove and after his open defiance of the committee was manifested, the chairman of the committee read into the record what has been called a false criminal record of Brandhove. The Court condemns this act. But the question arises whether this act can give rise to a cause of action under the Civil Rights Statute. This Court, scrutinizing this act, condemns it; but no constitutional right of this plaintiff was infringed. The committee had no power to punish Brandhove; it had no power resembling the act of the Board of Educa-

tion in the *Bomar v. Keyes* case. It could certainly have had no effect on the man for when he left the hearing chambers he could go out and make all the speeches he desired to make and to continue to present his petition to anyone in the State Capitol. In his pleading he makes no claim that he intended to pursue any course of future action which was interfered with. The complaint on its face shows the appellant was represented by counsel; that he was not timid but bold.

Consider the effect of the act condemned by this Court. If it gives rise to a cause of action under the Civil Rights Act, is a State Prosecutor subject to a claim for civil damages if he introduces incompetent evidence against a defendant who had recently been engaged in petitioning Congress or making public speeches? This Court, in reconstructing the cause of action of the plaintiff, has created a mantle of immunity which may be donned by any person, and particularly persons engaged in subversive activities, and thus stultify orderly law and process of law.

The rioter engaged in the so-called exercise of his right of free speech, who breaks a window or commits an assault, in this decision has created for him a claim for relief under the Civil Rights Act if he alleges his subsequent arrest was as an act of reprisal for having exercised the right of free speech.

We respectfully submit that the deprivation of the right to work, which actually occurred as a result of the action of the Board of Education, is a far different case than an error committed in the admission of

evidence at a hearing in a legislative committee discharging a legislative function in a lawful manner. The importance of this subject, that of creating a claim for relief on the theory of reprisal when a State Legislative Committee is involved, we respectfully submit should be re-examined and the Court, we request, should permit the re-examination before this Court in bank.

VII.

THE COMPLAINT IS NEITHER A SHORT NOR A PLAIN STATEMENT OF THE CLAIM OF APPELLANT.

The general rules of pleading of the Federal Rules of Civil Procedure require a short and plain statement of the claim showing that the pleader is entitled to relief.

Rule 8(a) (2) Fed. Rule Civ. Procedure.

The complaint is neither a short statement nor a plain statement. Seventy-two pages of the Transcript of Record are required to set out the complaint. That the Court recognized that the complaint is not short appears from the statements of the Court:

On page 2 there appears the statements:

"The complaint incorporates an extensive amount of evidentiary matter, * * *"

"The particulars of the charge are lengthy but unimportant here."

On page 4 there appears the statement:

"Appellant's complaint pieces together these proceedings and incidents, plus the sending by the

> Committee of two telegrams described in the footnote."

That the Court likewise recognizes that the complaint is not a plain statement of the claim for relief appears from the language appearing on page 6 of the opinion:

> "Our purpose is merely to point out that the alleged circumstances of this case are *too ambiguous and complex* to warrant judgment on the complaint alone." (Italics added.)

That the complaint is not plain is demonstrated by the conclusion of the Court that the pleading states a claim for relief for damages for reprisal, punishment and oppression for the exercise of a constitutional right. The theory of the complaint as written was not based on the theory of the Court as to its sufficiency.

The appellant in his complaint as written failed to state a claim for relief; the appellant in his brief failed to sustain a claim for relief; the appellant in his oral argument was unable to present a situation stating grounds for relief.

This Court has created the claim for relief for the appellant.

Appellant made no effort to amend his "ambiguous and complex" complaint.

We respectfully submit on this phase, the appellees should not be called upon to answer this complaint; the charge is so ambiguous that the claim for relief

this Court found was not discernible either to the appellant or the appellees or to their counsel.

CONCLUSION.

Our petition is for a rehearing. We respectfully request that the hearing be in bank.

We respectfully submit that the Court was in error in reading into appellant's complaint something that is not there and then sustaining its sufficiency. In stressing the motive of malice pleaded by appellant, the Court failed to apply the rule that malice in law does not exist where an act is lawfully done in a lawful manner. Further, a defendant should not be required to answer a complaint on its face "ambiguous and complex".

Fundamental and vital legal questions are involved in this appeal, none of which are even referred to in the opinion, much less discussed or decided:

A. The right to petition the California Legislature is not one secured to appellant by the Constitution or laws of the United States.

B. The judiciary has not the power to inquire into the motives of the legislative branch of the government.

We further urge:

C. State legislatures are immune from civil liability.

The impact of the present opinion upon the Legislature of the State of California is obvious. The ques-

tions resolved in this case by this Court, as the opinion presently stands, can not help having a serious effect on the right of the people to elect representatives to execute the functions of their office without fear of prosecution, civil or criminal.

The Court here has decided the motives prompting lawful acts of State Legislators acting as such may be inquired into by the Judiciary. The authorities seemed uniform to the contrary until this decision. We earnestly urge a re-examination of the entire appeal.

Dated, San Francisco, California,
July 28, 1950.

HAROLD C. FAULKNER,
WILBUR F. MATHEWSON,
MELVIN, FAULKNER, SHEEHAN & WISEMAN,
FRED N. HOWSER,
Attorney General of the State of California,
C. J. SCOTT,
Assistant Attorney General of the State of California,
RALPH N. KLEPS,
J. D. STRAUSS,
A. C. MORRISON,
Attorneys for Appellees and Petitioners other than Elmer E. Robinson.

Certificate of Counsel.

I hereby certify that I am of counsel for appellees and petitioners other than Elmer E. Robinson in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
July 28, 1950.

Wilbur F. Mathewson,
Of Counsel for Appellees and Petitioners other than Elmer E. Robinson.